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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1122

BENEFICIAL FINANCE CO. and EDWARD R. NEWHALL,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Virtually all of the arguments raised by Respondent have already been answered in the Petition filed by Beneficial and Newhall (hereinafter "the Beneficial Petition"). Only a few points need be added here.

1. Respondent purports to treat all issues presented by the various petitions in these cases. In fact, however, Respondent has totally ignored the very first point raised in the Beneficial Petition—that the mass confusion at the two trials prevented each defendant from obtaining due process. By focusing almost exclusively on the fact that evidence was admitted subject to limitations (Resp's Brief pp. 26-28), and without even addressing itself squarely to the mid-trial

changes in limitations (involving hundreds of extensions), Respondent attempts to leave the impression that this was the only element of confusion. Respondent simply disregards as if nonexistent all the aspects of confusion in addition to the changes in limitations, including the large number of defendants, charges, counts, indictments, and offenses; the length of trials, the items and combinations of evidence; the confused and lengthy instructions; the numerous determinations required of the jury, and many other aspects of these incredible proceedings. Respondent does not even address itself to the point of *Blumenthal* v. *United States,* 332 U.S. 539 (1947), and *Bruton* v. *United States,* 391 U.S. 123 (1968), that there are practical and human limitations on what a jury can be expected to follow in mass trials of great length and complexity.[1] Even as to the limitations on evidence, Respondent is content to argue that petitioners have not demonstrated that the jury disregarded the limitations and changes in limitations.[2] This argument, of course, overlooks not only the rule that no such demonstration need be made but the absolute impossibility of any such show-

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[1] The *Blumenthal* case is not cited at all by Respondent, and *Bruton* is mentioned only in a footnote in connection with an entirely different point (Resp's Brief p. 19 n. 11).

[2] Respondent attempts to give the impression that the hundreds of evidence limitations and extensions were "carefully and exhaustively" called to the jury's attention just prior to its deliberations (Resp's Brief p. 28). Using the first trial as an illustration, the changes in limitations were read to the jury only once, as a 38-page instruction lasting 90 minutes, six weeks prior to the jurors' deliberations as to 72 determinations of guilt or innocence. While during its lengthy final instructions the trial court called upon the jurors to give effect to the original and expanded evidence limitations announced from time to time over five months of trial, the court neither summarized the evidence nor restated the limitations. Over defense objection, the trial court permitted the prosecutor, in his final argument, to refer to evidence without

ing in cases of this kind. Thus, Respondent has ignored or otherwise failed to answer the chief point in the Beneficial Petition while at the same time conceding that these trials "are believed to be the longest and most time consuming in Massachusetts history" (Resp's Brief p. 6).

2. Respondent says that *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969), is not in conflict with the instant cases because *Spock* was decided by the First Circuit exercising its supervisory power over the federal courts. While the First Circuit said it felt obliged to *consider* the issue in the exercise of this power (*id.* at 180), it then proceeded to cite and rely upon cases decided on constitutional grounds (*id.* at 180-183), to quote articles discussing the constitutional right to trial by jury (*id.* at 181), to use reasoning inescapably grounded upon the Constitution, and to conclude that "The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly" (*id.* at 182). To put it simply, *Spock* simply will not square with the use of special questions at the first trial in the instant cases.

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stating the limitations on its admissibility (I Tr. 7128). A mere glance at the chart reflecting the original and extended limitations as to certain items of the Commonwealth's evidence (Ex. A to the Beneficial Petition) demonstrates that the jurors, relying solely on previous oral announcements of such limitations without the benefit of complex charts, could not conceivably have segregated the items of testimony by defendant, by indictment, and by counts of indictments (see Beneficial Petition p. 15 n.20, n.21). It is illustrative of the workings of these mass trials that the substantive indictments against Beneficial, the other two corporate defendants, and the individual defendants (other than Hanley and Garfinkle) were stapled together by the trial court prior to submission to the jury (I Tr. 7307)—just one example of the denial to each defendant of his right to the jury's individual attention.

3. The most disingenuous section of Respondent's response is its treatment of suppressed evidence. By portraying the prosecution as failing to appreciate that the all-important expense vouchers, part of "twenty-four file cabinet drawers full of documentary materials" (*id.* at 34), might somehow be important to the defense, the Respondent completely distorts what actually occurred. Prior to trial, the prosecution had used these vouchers *both* at the secret Crime Commission hearings *and* before the Grand Jury (see Beneficial Petition p. 18 n. 26), and had then promised the witness either not to use them at trial (according to the witness) or not to use them so long as there was no interference with a proper investigation (according to the prosecutor).[3] Thus, far from trying to place an "impossible burden" on the Commonwealth to search twenty-four file drawers for materials that might have some relevance to the defense, petitioners were merely seeking to have evidence made available to the defendants which the prosecution was specifically aware of, which it had already used, and which bore directly on the central issue in the case.

Respondent also asserts that there is no inconsistency between the testimony of the chief prosecution witness, Heath, describing a meeting at Purcell's restaurant with Glynn and Pratt and the luncheon vouchers showing no such meeting, implying that the Purcell's meeting was not for lunch. Respondent states, "Heath testified that he met Glynn and Pratt on the day in question 'at Haley's restaurant' and they then went over to Purcell's" (Resp's Brief p. 35 n. 20). What Heath really said was that "we met at Haley's restaurant. Then we went down to Purcell's *for*

[3] See Beneficial Petition p. 19.

lunch" (emphasis added). In answer to the question: "And was there anyone else with you in this restaurant * * * other than Mr. Glynn and Mr. Pratt?," Heath answered, "No" (I Tr. 3529-30). Heath was also asked: "And can you tell us if you had lunch as part of this meeting between the three of you?", and he answered, "Yes, sir, we did" (I Tr. 3530). This testimony cannot be squared with the expense vouchers which reflected luncheon guests other than Glynn and Pratt. This type of suppression of crucial evidence violates constitutional guarantees even if the Commonwealth could be deemed to have acted in good faith. *Giglio* v. *United States,* 405 U.S. 150, 153 (1972).

Finally, the Commonwealth states that it "voluntarily" produced the vouchers during the course of the second trial (Resp's Brief, p. 44)—too late, in any case, to assist the defense in the first trial. In fact, the vouchers came to light inadvertently during the second trial, and were then produced in response to demands by various defendants.[4]

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[4] Perhaps recognizing the weakness of its position, the Commonwealth attempts to disavow anything done by the prosecutor, Simonds, claiming "he was not the individual who determined what portion of the Commonwealth's files were to be turned over to the petitioners" (Resp's Brief p. 44) Simonds had investigated the cases for the Crime Commission and had been appointed a Special Assistant Attorney General for the purpose of presenting the cases to the grand jury. A virtually identical argument was flatly rejected in *Giglio* v. *United States, supra,* 405 U.S. at 154, where this Court held that a promise of the Assistant United States Attorney who presented the case to the grand jury but did not try the case "must be attributed" to the government. And here, just as in *Giglio,* the prosecution's case depended almost entirely on the testimony of one witness. That witness' credibility "was therefore an important issue in the case," and the jury was entitled to know of any matter "relevant to his credibility * * *" (405 U.S. at 155).

4. Respondent's double jeopardy argument has been so fully answered that we need only pose a single question. If, as Respondent asserts, the second trial involved a continuing conspiracy to make annual payments, whereas the conspiracy in the first trial involved only "a narrow agreement, limited in time, having as its sole purpose the making of a 'one shot' payment * * *" (Resp's Brief p. 45), why did the first trial last five months, cover 7,491 pages of transcript, result in five hours of instruction, and require 72 determinations of guilt or innocence?

Respectfully submitted,

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